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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 584

DURWOOD T. PYE,
Appellant,

VERSUS

STATE HIGHWAY DEPARTMENT OF GEORGIA
AND
HOWARD W. ALLGOOD
Appellees.

Appeal from The Supreme Court of Georgia

MOTION TO DISMISS OR AFFIRM

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VERSUS.

STATE HIGHWAY DEPARTMENT OF GEORGIA ET AL.,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellee, THE STATE HIGHWAY DEPARTMENT OF GEORGIA, respectfully moves the Court to dismiss the Appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Georgia, on the grounds that the decision below is clearly correct and the question is so unsubstantial as not to warrant further argument.

I.

THE STATE CONSTITUTIONAL PROVISION INVOLVED AND QUESTIONS PRESENTED

A.

The Constitutional Provision

Art. I, Sec. III, Par. I of the Georgia Constitution

provides for condemnation of private property and for the payment of just and adequate compensation therefor, as follows:

> "In case of necessity, private ways may be granted upon just compensation being first paid to the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid, except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, *but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness.* The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders and the State and its subdivisions may be protected." (Italics added for reference purposes.) Ga. Code Ann., § 2-301 (1969 Cum. Supp.)

Appellant has attacked the italicized portion of the paragraph, the so-called subordination provision.

Appellant-condemnee has failed to allege or prove the existence of any bonded indebtedness superior to his right of just and adequate compensation.

In this Court, but not in any court below, appellant has sought to show, for the first time, the existence of "bonded indebtedness". In his Jurisdictional Statement, appellant has included Appendix H (purporting to show the bonded indebtedness of the City of Atlanta, Georgia)

and Appendix I (purporting to show the bonded indebtedness of Fulton County, Georgia).

Because this case was instituted by the *State* Highway Department of Georgia, and the compensation for appellant's property comes solely from the State, the asserted bonded indebtedness of the City of Atlanta and Fulton County is wholly irrelevant to this litigation.

Appellant has also (for the first time) included in his Jurisdictional Statement Appendix G, which he has asserted shows the bonded indebtedness of the State, whereas (as will be conclusively demonstrated below) Appendix G shows the bonded indebtedness of certain Authorities, which bonds are not debts of the State.

B.

Questions Presented

1. Where appellant-condemnee's right to just and adequate compensation is not subordinated to any bonded indebtedness, does appellant have standing to challenge the constitutionality of a subordination provision?

2. Where appellant-condemnee's right to just and adequate compensation is not subordinated to any bonded indebtedness, does a subordination provision deprive appellant of due process or equal protection of the law?

3. Is such a substantial federal question presented by this appeal as is necessary to the appellate jurisdiction of this Court?

II.

ARGUMENT

This Appeal Presents No Substantial Question

Appellant has correctly conceded the following proposition of law:

> "The United States Constitution does not require that payment be made in advance of taking. . . ." (Appellant's Jurisdictional Statement, p. 20.)

This Court so held in *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.*, 169 U.S. 557, 568, 569 (1898), *Dohany v. Rogers*, 281 U.S. 362, 366 (1930), and *Bailey v. Anderson*, 326 U.S. 203, 205 (1945).

The Georgia constitutional provision here in issue was amended in 1960 so as to provide the public benefit to be derived from the foregoing legal principle. Ga. Laws 1960, p. 1225 (Ratified November 8, 1960).

Pursuant to such constitutional authorization, in 1961 the Georgia General Assembly adopted the Act, entitled "Procedure for the Exercise of Power of Eminent Domain", referred to in Appendix F of appellant's Jurisdictional Statement.

That Act requires that the condemnor (appellee herein) file with its declaration of taking a "statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken, including consequential damages to land not taken, accompanied by a sworn copy as an exhibit of the appraiser's report justifying said sum." Ga. Laws 1961, § 3(5), p. 517 at 520, as amended, Ga. Code Ann., § 36-1303(5). At the same

time, the condemnor is required to deposit in court the compensation estimated to be due.

As has been pointed out by the Supreme Court of Georgia in *State Highway Department v. Smith*, 219 Ga. 800, 808 (1964): "Our Act of 1961, as amended, is in all material respects like the Federal statute (40 U.S.C.A., § 258a) designed for the same purpose, the validity of which has been repeatedly upheld against similar constitutional attacks."

The Federal statute has, indeed, been held valid. See *Travis v. United States*, 287 F. 2d 916, *cert. denied*, 368 U. S. 824 (1961).

In this case, the sum of $19,000.00 was estimated to be due to appellant and was paid into court. Appellant has described the procedural and substantive protection thereafter afforded him as follows (appellant's Jurisdictional Statement, p. 30):

> "Not earlier than 15 days following publication each week for four weeks of notice of the filing of the declaration of taking and the condemnation petition, appellant was authorized to make application to the court for the $19,000.00 and have the same paid to him on account. He was also entitled to apply for the appointment of a special master to require payment into court of additional amounts, and if the master's report so requiring, be approved by the court he was entitled to have such additional amounts paid to him upon giving bond with security in double the sum thereof. Appellant was also authorized to appeal to a jury for ascertainment of just and adequate compensation (which appellant did subject to all his contentions of illegality). Following the jury trial either party, State Highway Department or appellant, is authorized 'to move for

a new trial and file a brief of exceptions as in other cases at law.'

"When just and adequate compensation 'has been finally fixed and determined as provided by law', i.e., after jury trial, and disposition of any motion for new trial by State Highway Department or appellant, and after new trial if such be granted, etc., *then,* at that stage, appellant 'shall then be paid in preference to all other obligations *except bonded indebtedness.*'"

Thus, appellant admits that the $19,000.00 paid into court is not subordinated (see also appellant's Jurisdictional Statement, pp. 30-31), and consequently, the only amount which could be subordinated is the difference, if any, between the amount paid into court and the final award.

However, appellant has not shown that there is any bonded indebtedness as to which such difference, if any, can be subordinated. Certainly, he has nether alleged nor proved the existence of any such indebtedness. Certainly also, no bonded indebtedness of a city or county could take preference over a judgment in his favor, if any, against the State.

What appellant has done is to assert, for the first time, that bonds issued by certain state authorities are bonds of the State. (See Appendix G to appellant's Jurisdictional Statement). It is difficult for us to see how the appellant could make that mistake. Authority bonds are not State bonds; that is why Georgia has Authorities.

Take Georgia Education Authority (Schools), Ga. Laws 1951, pp. 241 at 252 (as amended), for example. Section 14 (Ga. Code Ann., § 32-1414a) provides that:

"Revenue bonds issued under the provisions of this

> Act shall not be deemed to constitute a debt of the State of Georgia or a pledge of the faith and credit of the State, but such bonds shall be payable solely from the fund hereinafter provided for and the issuance of such revenue bonds shall not directly, indirectly or contingently obligate the State to levy or to pledge any form of taxation whatever therefor or to make any appropriation for the payment, and all such bonds shall contain *recitals on their face covering substantially the foregoing provisions of this section* . . . ." (Emphasis supplied.)

All the Authorities referred to in Appellant's Appendix G were created by Acts containing provisions that their bonds do not "constitute a debt of the State or a pledge of the faith and credit of the State. . . ." Georgia Education Authority (University), Ga. Laws 1949, pp. 1009, 1017; Georgia Highway Authority, Ga. Laws 1967, pp. 385, 403; Georgia Building Authority, Ga. Laws 1951, pp. 699, 708; Georgia Building Authority (Penal), Ga. Laws 1960, pp. 892, 901; Georgia Building Authority (Markets), Ga. Laws 1955, pp. 224, 239, 240; Georgia Building Authority (Hospitals), Ga. Laws 1939, pp. 144, 152; Georgia Ports Authority, Ga. Laws 1945, pp. 464, 472, 473; Jekyll Island—State Park Authority, Ga. Laws 1950, pp. 152, 160, Ga. Laws 1960, pp. 89, 93; Stone Mountain Memorial Association, Ga. Laws 1958, pp. 61, 75.

Pursuant to the above quoted statutory directive, all Authority bonds contain the following recital on their face:

> "The bonds of this Series do not constitute a debt of the State of Georgia or a pledge of the faith and credit of the State, and no holder shall have the right to compel any exercise of the taxing power of the State to pay such bonds or interest thereon. . . ."

Moreover, all Authorities referred to in appellant's Appendix G contain identical directives. Ga. Code Ann. § 32-1414a; Ga. Code Ann. § 32-114a; Ga. Code Ann. § 95-2323; Ga. Code Ann. § 91-514a; Ga. Code Ann. § 77-1014; Ga. Code Ann. § 65-324; Ga. Code Ann. § 99-1414; Ga. Code Ann. § 98-207; Ga. Code Ann. § 43-618a; Ga. Code Ann. § 43-6, note (Ga. Laws 1958, pp. 61, 75).

The Supreme Court of Georgia has repeatedly held that Authority bonds are not State bonds. *McLucas v. State Bridge Bldg. Authority*, 210 Ga. 1, 6, 77 S.E. 2d 531, 535 (1953); *State of Georgia v. Regents of University*, 179 Ga. 210, 216, 175 S.E. 567, 570, 571 (1934); *Sheffield v. State School Bldg. Authority*, 208 Ga. 575, 579, 68 S.E. 2d 590, 594, 595 (1952). In *McLucas v. State Bridge Bldg. Authority*, supra, the Court said:

> "While the Authority is an instrumentality of the State, it is nevertheless not the State, nor a part of the State, nor an agency of the State. It is a mere creature of the State, having distinct corporate entity. Its revenue bonds, as section 23 of the act expressly and emphatically declares, are not obligations or debts of the State, nor a pledge of the credit of the State, but they are payable solely and exclusively from revenue derived from a use of its facilities; and the State is not directly, indirectly, or contingently obligated to levy or pledge any form of taxation whatsoever therefor or to make any appropriation for the payment of them, and the act requires that the bonds, when issued, must contain recitals on their face to this effect. They are first, last, and always a corporate debt of the Authority and in no sense a debt of the State." (210 Ga. at 6, 77 S.E. 2d at 535.)

In Georgia, it is well known that the Authorities were

created to avoid the constitutional prohibitions on the State's borrowing money, so well known as to be "text book" knowledge. According to the Encyclopedia of Georgia Law:

> "This title [Authority Financing] is concerned with the development of a system for the acquisition of funds for public purposes without the creation of such public debts as are prohibited by the State Constitution, or which might adversely affect the credit of the state and its political subdivisions." (*3 E.G.L. Authority Financing*, § *1*.)

If appellant had contended in the courts below that Authority bonds were State bonds, the courts below would have already disposed of this alleged issue.

Nevertheless, the court below found as follows (Appellant's Jurisdictional Statement, Appendix C, p. 60):

> "In our view he lacks standing to make this contention. The estimated amount of compensation for taking his property was in fact paid into court. He has not been injured by the subordination provision and therefore does not show any 'infringement upon his rights' due to such provision. Ga. Music Operators Assn. v. City of Atlanta, 183 Ga. 794 (190 SE 32)."

The cited decision, *Ga. Music Operators Assn. v. City of Atlanta*, relied in part upon the decision of this Court in *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 410 (1900), where it was held that a person with actual notice of a land registration proceeding could not challenge the constitutionality of a provision of the land registration act allowing notice by publication (and other means of constructive notice), because he was not affected by the provision of which he complained. Appellant herein is not affected by the subordination provision

of which he complains, and he has no standing to challenge its constitutionality.

In *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316, 324, 325 (1945), this Court, citing *Tyler, supra*, held:

> "In any case the Court will not pass upon the constitutionality of legislation . . . upon the complaint of one who fails to show that he is injured by its operation. . . ."

The Georgia Supreme Court correctly decided that appellant has no standing to challenge the validity of the so-called subordination clause.

If appellant had the necessary standing, our argument would be that subordination no more violates due process or equal protection than do the laws of bankruptcy. Subordination to state bonds, if there were any, would only become critical if the amount of the supposed bonds exceeded the ability of the State to pay them when due. Such subordination would not erase a condemnee's right to just and adequate compensation; but would at most merely delay payment, if the State were unable to pay both non-existent bonds and just compensation when due. Subordination does not violate due process or equal protection. Georgia law, moreover, recognizes the remedy of mandamus to enforce a final judgment fixing the amount of compensation. *Harrison v. State Highway Department of Georgia*, 183 Ga. 290, 295, 296, 188 S.E. 445, 448 (1936).

From the foregoing, it appears that appellant is without standing, his contentions are without substantial merit, and his appeal should be dismissed for failure to present a substantial federal question. *Zucht v. King*, 260

U.S. 174, 176 (1922); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952) (per curiam); *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 596, 599 (1913); *Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.*, 252 U.S. 388 (1920).

CONCLUSION

It is respectfully submitted that the decision of the Court below is clearly correct, that the Appellant is without standing before this Court to raise the question sought to be raised, that the question is so unsubstantial as not to warrant further argument; and that the public interest in a final decision would be best served by the dismissal of this Appeal, or, alternatively, the affirmance of the judgment entered in this case by the Supreme Court of Georgia.

Respectfully submitted,

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PROOF OF SERVICE

I, RICHARD L. CHAMBERS, III, hereby certify that I am counsel for the Appellee, State Highway Department of Georgia, that I am a member of the Bar of the Supreme Court of the United States, and that on the 11th day of September, 1970, I served the within and foregoing Motion to Dismiss or Affirm upon the Appellants herein named by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at their proper post office addresses, to-wit:

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I further certify that all parties required to be served have been served.

/s/ RICHARD L. CHAMBERS, III

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